Supreme Court, U.S.
FILED

95 • 453 SEP 18 1995

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

JOE MICHAEL LUTHER,

Petitioner,

v.

ETHICON, INC. and
JOHNSON & JOHNSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ROGER W. HUGHES

ADAMS & GRAHAM, L.L.P.
P.O. Drawer 1429
Harlingen, TX 78551-1429
210/428-7495; FAX: 210/428-2954
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

43 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals can grant mandamus relief, without first complying with Fed. R. App. P. 21(b) to direct Petitioner and the District Court to appear and file an answer, or to permit them time to do so.

2. Whether a two-sentence order that gives no factual or legal basis for the ruling violates the requirements of *Will v. United States*, 389 U.S. 107, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967) that the Court of Appeals give a reasoned justification for a decision to issue a writ of mandamus.

3. Whether the Court of Appeals erred, under the "clear abuse of discretion" standard, in granting a writ of mandamus to set aside the District Court's ruling that Respondents failed their evidentiary burden under 28 U.S.C. § 1404(a) to prove the convenience of the parties and witnesses strongly favored a transfer when they failed to identify the material witnesses and documents.

4. Whether the Court of Appeals erred in failing to order a rehearing, if on the record before it, mandamus relief was warranted, because the Respondents' failure to timely answer discovery deprived Petitioner of evidence to contradict their venue proof.

PARTIES TO THE PROCEEDING

Petitioner Joe Michael Luther ("Luther") was respondent below. The Honorable Filemon Vela was listed as an interested party below, but the Fifth Circuit did not order him to answer the Petition and he did not personally appear.

Respondents are Ethicon, Inc. and Johnson & Johnson ("Ethicon/J&J"), who were petitioners below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CITATION OF OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

1. Procedural History 3

2. Ethicon/J&J's Motion to Transfer 4

3. Summary Mandamus 6

REASONS FOR GRANTING CERTIORARI 7

I. GRANTING MANDAMUS RELIEF WITHOUT ORDERING OR PERMITTING A RESPONSE CONFLICTS WITH FED. R. APP. P. 21(b), FIFTH CIRCUIT PRECEDENT, AND DECISION OF THE SECOND AND SIXTH CIRCUITS 8

II. THE FIFTH CIRCUIT'S TWO-SENTENCE ORDER FAILS TO COMPLY WITH THE HOLDING IN *WILL V. UNITED STATES*, 389 U.S. 107, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967) THAT THE COURT ISSUING A WRIT OF MANDAMUS GIVE A REASONED EXPOSITION JUSTIFYING ITS ACTIONS 12

TABLE OF CONTENTS – Continued

Page

III. DISTRICT COURT DID NOT CLEARLY ABUSE ITS DISCRETION OR USURP ITS POWER BY CONCLUDING ETHICON/J&J FAILED TO CARRY THEIR BURDEN TO PROVE THE CONVENIENCE OF THE WITNESSES AND PARTIES MANDATED A TRANSFER OF VENUE 13

A. Standard for Mandamus Relief Militates Against Mandamus Review of Ruling About Which Venue is Most Convenient 13

B. District Court Did Not Clearly Abuse Its Discretion 16

IV. IF MANDAMUS RELIEF WAS APPROPRIATE, THE CORRECT REMEDY IS TO ORDER THAT THE DISTRICT COURT RECONSIDER ITS DECISION 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 101 S.Ct. 188, 66 L.Ed.2d 193 (1960).....13, 14

Amer. Gen. Fire & Cas. v. Wal-Mart Stores, Inc., 791 F.Supp. 763 (W.D.Ark. 1992) 17

Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977)..... 10

Continental Airlines, Inc. v. American Airlines, Inc., 805 F.Supp. 1392 (S.D.Tex. 1992) 17

Cord v. Smith, 370 F.2d 418 (9th Cir. 1966)..... 9

Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834 (9th Cir. 1986)..... 16

Digital Systems, Inc. v. Carpenter, 387 F.2d 529 (5th Cir. 1967) 9

Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2nd Cir. 1978), *cert. denied*, 440 U.S. 908, 99 S.Ct. 1215, 59 L.Ed.2d 455 (1979)..... 17

FDIC v. Citizen's Nat. Bank & Trust Co., 592 F.2d 364 (7th Cir. 1978), *cert. denied*, 444 U.S. 829, 100 S.Ct. 56, 62 L.Ed.2d 37 (1979)..... 16

Garner v. Wolfinbarger, 433 F.2d 117 (5th Cir. 1970) 15

Headrick v. A.T. & S.F. Ry., 182 F.2d 305 (10th Cir. 1950).....17, 18

Heller Financial, Inc. v. Midway Powder Co., Inc., 883 F.2d 1286 (7th Cir. 1989)..... 17

Hupp v. Siroflex of Amer., Inc., 848 F.Supp. 744 (S.D.Tex. 1994) 16, 17

TABLE OF AUTHORITIES – Continued

Page

In Re: April 1977 Grand Jury Subpoenas, 584 F.2d 1366 (6th Cir. 1978), *cert. denied*, 440 U.S. 934, 99 S.Ct. 1277, 59 L.Ed.2d 492 (1979)..... 9

In Re: Blodgett, 502 U.S. 236, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992)..... 11

In Re: First South Savings Assoc., 820 F.2d 700 (5th Cir. 1987) 15

In Re: McDonnell-Douglas Corp., 647 F.2d 515 (5th Cir. 1981) 15, 18

In Re: Repetitive Stress Injury Litigation, 35 F.3d 637 (2nd Cir. 1994) 9

Kron Medical Corp. v. Groth, 119 F.R.D. 636 (M.D.N.C. 1988)..... 19

Lykes Bros. Steamship Co. v. Sugarman, 272 F.2d 679 (2nd Cir. 1959) 17, 18

Mallard v. U.S. District Court, S.D. of Iowa, 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989)..... 14

McDermott Int., Inc. Co. v. Lloyds Underwriters of London, 944 F.2d 1199 (5th Cir. 1991), *reh'g en banc denied*, 947 F.2d 1489 (5th Cir. 1991)..... 14

Modern Computer Corp. v. Ma, 862 F.Supp. 938 (S.D.N.Y. 1994) 17

Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) 14

Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 84 S.Ct. 769, 11 L.Ed.2d 674 (1964)..... 14

Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964)..... 14

TABLE OF AUTHORITIES – Continued

Page

Shuttle v. Armco Steel Corp., 431 F.2d 22 (2nd Cir. 1970), *cert. denied*, 401 U.S. 90, 91 S.Ct. 871, 27 L.Ed.2d 808 (1971) 16

State Street Capitol Corp. v. Dente, 855 F.Supp. 192 (S.D.Tex. 1994) 18

Stewart Organ., Inc. v. Ricoh Corp., 487 U.S. 22, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988) 16

Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145 (10th Cir. 1967) 17

Time, Inc. v. Manning, 366 F.2d 690 (5th Cir. 1966) 15, 16, 17

Van Dusen v. Barrack, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964) 16, 19

Will v. United States, 389 U.S. 107, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967) 7, 12, 13

Young v. Armstrong World Ind., Inc., 601 F.Supp. 399 (N.D.Tex. 1984) 17

UNITED STATES CODE:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292(b) 7

28 U.S.C. § 1404(a) ..... *passim*

28 U.S.C. § 1651 ..... 1, 13

FEDERAL RULES OF APPELLATE PROCEDURE:

Rule 21(b) 2, 6, 7, 8, 9

TABLE OF AUTHORITIES – Continued

Page

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 26(d) 4

LOCAL RULES:

District of Columbia Circuit Rule 21(a) 10

Ninth Circuit Rule 21-4 10

TREATISES:

1 Childress & Davis, Federal Standards of Review (2d Ed.) § 4.22 (1992) 14

15 Wright, Miller & Cooper, Federal Practice & Procedure § 3848, § 3851 (1986) 17, 18

16 Wright, Miller, Cooper & Gressman, Federal Practice & Procedure § 3935 (1977) 15

Gabriel & Powell, Federal Appellate Practice: 5th Circuit, § 4:12 (1994) 9

Tigar, Federal Appeals, (2d Ed.), § 3.07 (1993) ... 9, 15, 19

CITATION OF OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Fifth Circuit is included in the Appendix A. The Court of Appeals' order denying Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc is included in Appendix B. Magistrate Judge John Black's unpublished Memorandum and Order, filed June 6, 1995, is included in Appendix C. The unpublished Order of U.S. District Judge Filemon Vela, filed June 27, 1995, overruling Respondent's objections to Magistrate Judge Black's Memorandum and Order, is included in Appendix D.

JURISDICTION

The Court of Appeals' Judgment was entered on July 12, 1995. See Appendix A1. Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc were denied on August 31, 1995. See Appendix B1-B2.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Court of Appeals for the Fifth Circuit had jurisdiction over the original proceeding for mandamus relief under 28 U.S.C. § 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1404(a) provides in pertinent part:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Fed. R. App. P. 21(b) provides in pertinent part:

> "(b) **Denial; Order Directing Answer.** If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases."

STATEMENT OF THE CASE

1. Procedural History

On March 3, 1995, Luther sued Respondents ("Ethicon/J&J") in the Southern District of Texas, Brownsville Division, for failure to pay him for an invention that revolutionized suture needle production. Their answer admitted jurisdiction and venue were proper. On May 10, 1995, they moved (1) to extend time to answer discovery; and (2) to transfer venue to the San Angelo Division, Northern District of Texas, under 28 USC § 1404(a). After a hearing on these motions, Magistrate Judge Black denied the Motion to Transfer. See Appendix C1-C2. He ordered the discovery be answered by June 16, 1995. On June 27, 1995, the District Court Judge Vela confirmed the Magistrate's ruling on the § 1404(a) transfer. See Appendix D1-D5.

On July 7, 1995, Ethicon/J&J filed a Petition for Writ of Mandamus in the Court of Appeals for the Fifth Circuit to overturn the District Court's venue ruling. On July 12, 1995, the Fifth Circuit issued an unpublished two-sentence order granting the Petition and ordering District Court Judge Vela to transfer Luther's case to the Northern District of Texas, San Angelo Division. See Appendix A1. The Fifth Circuit never directed Luther or District Court Judge Vela to appear and file an answer.

On July 25, 1995, Luther filed a Motion for Rehearing and Suggestion for Rehearing En Banc, which the Fifth Circuit denied without opinion on August 31, 1995. See Appendix B1-B2.

2. Ethicon/J&J's Motion to Transfer

In order to get a one-week extension of time to file their answer, Ethicon/J&J agreed on April 7, 1995, to accept discovery responses, including Interrogatories and Requests for Production. After filing its answer, Ethicon/J&J moved to transfer venue and objected to the discovery. Among other reasons, Ethicon/J&J argued the San Angelo Division would quash as premature under Fed. R. Civ. P. 26(d), the discovery they had agreed to accept. Luther's Response to Ethicon's objections noted that Ethicon/J&J's tactics prevented him from obtaining discovery he might need on the venue issue and requested enforcement of the agreement.

Ethicon/J&J's § 1404(a) Motion submitted only Mr. Stean's conclusory affidavit. See Appendix E. Besides saying that Luther resides in San Angelo, he merely states:

> "7. The 'Luther Machine' as well as most of the documents relevant to this action are located in Ethicon's San Angelo plant. The incidents of which Luther complains all allegedly occurred at Ethicon's San Angelo plant." See Appendix E2.

At the June 1, 1995, Initial Pretrial Conference Magistrate Judge Black took up the venue motion, set up a Scheduling Order, and directed Ethicon/J&J to answer Interrogatories by June 16, 1995.

On June 6, 1995, Magistrate Judge Black denied a transfer. His order specifically noted that the Motion and Mr. Stean's Affidavit did not name any witness Defendants would call at trial or outline their testimony. See

Appendix C2. He noted evidence from the hearing that testimony and documents may be located in New Jersey and Puerto Rico. See Appendix C3-C4. The Court concluded it was left then with the evidence of Luther's choice of forum, evidence that witnesses and documents existed in New Jersey and Puerto Rico, the presence of Ethicon's registered agent in Houston, and unspecified witnesses and documents in San Angelo. See Appendix C3-C4. He concluded then that Defendants failed to carry their burden to show that the Brownsville Division was so inconvenient as to militate in favor of a transfer. See Appendix C4.

On June 27, 1995, District Judge Vela confirmed the Magistrate's Order. District Judge Vela noted that he would ". . . examine the Plaintiff's choice carefully, remaining vigilant against forum shopping, particularly when Plaintiff does not live in the Southern District of Texas." See Appendix D4. The Order outlined the proper factors. See Appendix D2. However, the Court noted that Defendants failed to identify their key witnesses or outline their testimony; the Court inferred that most of those witnesses would be their employees, properly noting that Defendants could compel them to attend. See Appendix D3. District Judge Vela noted the case law provided "rhetorical fodder" for both sides, but held Magistrate Judge Black's ruling to retain venue in Brownsville Division would not be disturbed. See Appendix D4.

Ethicon/J&J did not provide the verified discovery answers until June 30th, three days *after* District Judge

Vela ruled.[1] Ethicon's answers named five individuals who decided to implement Luther's machine and compensate him for it. Of them, one was in New Jersey; one was in Georgia; one was in the Western District of Texas; and the last two had no address given.

3. Summary Mandamus

Ethicon/J&J filed their Petition for Mandamus on Friday, July 7, 1995. Five days later the Fifth Circuit simply granted the Petition. The Order, in its *entirety*, read:

> "The petition for writ of mandamus seeking an order vacating the district court's June 6, 1995 order declining to transfer this case under 28 U. S. C. § 1404(a) is GRANTED.
>
> "A writ of mandamus will issue directing the district court to transfer the case under 28 U. S. C. § 1404(a) to the Northern District of Texas, San Angelo Division."

The Fifth Circuit did not request Luther or District Court Judge Vela to answer the Petition, as required by Fed. R. App. P. 21(b).

On July 25, 1995, Luther filed his Motion for Rehearing. Attached was his counsel's affidavit, which established he did not learn of the pendency of the petition until receiving it about noon on Monday, July 10, 1995, and that he learned that District Judge Vela did not receive the petition until much later. The affidavit further

---

[1] The answers given on June 16, 1995, were in draft, without any signature or verification.

showed that Luther's counsel did not have time to prepare any response and deliver it to the Fifth Circuit before July 12, 1995. Luther also attached Ethicon/J&J's answers to interrogatories.

The Fifth Circuit denied the Motion for Rehearing without opinion on August 31, 1995.

REASONS FOR GRANTING CERTIORARI

The Fifth Circuit's decision to grant mandamus relief to order a transfer of venue without directing or permitting a response and stating no legal or factual basis, presents a clear-cut question about the means by which a court of appeals may intervene in pretrial rulings. The Second, Fifth and Sixth Circuits had insisted on strict compliance with Fed. R. App. P. 21(b), that mandamus relief not be granted until the court had directed all respondents to file an answer, or they appeared; District of Columbia and Ninth Circuit local rules prohibit granting relief before directing that an answer be filed. In *Will v. United States*, 389 U.S. 107, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967), this Court made it clear that mandamus should not issue without a reasoned exposition of the appellate court's action.

The Fifth Circuit's actions diminish the District Court's role, by encouraging the belief it will re-apply the law to the facts for the losing party on a petition for mandamus. Issuing the writ in this manner practically reduces it to a form of interlocutory appeal, much like one under 28 U.S.C. § 1292(b) but without the need for consent or certification by the District Court.

The only means by which the Fifth Circuit could have reached its decision was to employ the "clear abuse of discretion" standard to re-evaluate the evidence before the District Court. The narrow question this case presents is whether that standard permits a court of appeals to reweigh the venue evidence or whether it limits the lower court to declaring the proper criteria, leaving the application to the lower court's discretion. This case demonstrates the soundness of the latter course. The District Court applied the well accepted rule that Ethicon/J&J had an evidentiary burden, which they did not satisfy when they failed to name witnesses or describe testimony. If its decision on this issue can be reviewed on its merits by mandamus, litigants will frequently invite the courts of appeal to superintend venue rulings.

I. GRANTING MANDAMUS RELIEF WITHOUT ORDERING OR PERMITTING A RESPONSE CONFLICTS WITH FED. R. APP. P. 21(b), FIFTH CIRCUIT PRECEDENT, AND DECISION OF THE SECOND AND SIXTH CIRCUITS

Fed. R. App. P. 21(b) states the court *shall* order that an answer be filed. It does not leave a middle road, allowing the court to grant a petition without directing or permitting an answer by the respondents. A mandamus is an original proceeding; some mechanism must exist to bring the respondents before a court of appeals so that it acquires jurisdictional power over them. Rule 21(b) was intended to set up that procedure to bring them before

the court. *Cord v. Smith*, 370 F.2d 418, 421 at n. 3 (9th Cir. 1966).[2]

The Fifth Circuit had recognized the need for an answer to put an original proceeding at issue. *Digital Systems, Inc. v. Carpenter*, 387 F.2d 529, 531 (5th Cir. 1967). Digital Data filed a petition for mandamus to protect certain trade secrets. Just before oral argument, the Fifth Circuit discovered it had failed to order anyone to file an answer and potential parties were not before the court. The court doubted it could adjudicate the petition, stating: "To get such an original proceeding at issue, it is necessary for an answer to be filed." 387 F.2d at 531. Instead, it denied the writ because the petition failed to disclose any abuse of discretion. *Ibid.*, 387 F.2d at 533. The most relief it would grant was to direct a rehearing of specific questionable rulings.

The Second and Sixth Circuits have insisted on strict compliance with Rule 21(b)'s insistence on requiring an answer from respondents before granting a petition for writ of mandamus. They treat an erroneous appeal only as a motion for *leave* to file a petition, not to be decided until the district judge is directed to file an answer. *See, In Re: Repetitive Stress Injury Litigation*, 35 F.3d 637, 640 (2nd Cir. 1994); *In Re: April 1977 Grand Jury Subpoenas*, 584 F.2d 1366, 1368, n. 2 (6th Cir. 1978), *cert. denied*, 440 U.S. 934, 99 S.Ct. 1277, 59 L.Ed.2d 492 (1979). The District of

---

[2] Fed. R. App. P. 21(b) does not permit either Luther or the District Court to answer until directed to do so by the clerk. Tigar, Federal Appeals (2d Ed.), § 3.15, p. 177 (1993); Gabriel & Powell, Federal Appellate Practice: 5th Circuit, § 4:12, pp. 4-7 (1994).

Columbia and Ninth Circuits' local rules prohibit granting relief without first ordering an answer be filed. *See,* District of Columbia Circuit Rule 21(a) [" . . . no responsive pleading shall be permitted unless requested by the Court. No such petition shall be granted in the absence of such a request."]; Ninth Circuit Rule 21-4 ["No answer to such a petition may be filed unless ordered by the Court. Except in emergency cases, the Court will not grant a petition without a response."]

Summarily granting petitions for mandamus without favoring a response could seriously undermine the mutual respect between trial and appellate courts. In *Bauman v. United States District Court,* 557 F.2d 650, 653-54 (9th Cir. 1977), Judge Wallace warned of the need for objective principles to guide the exercise of mandamus power.

> Unprincipled use of that power could also operate to undermine the mutual respect that generally and necessarily marks the relationship between federal trial and appellate courts. Further, without articulable and practically applicable guidelines to govern the issuance of extraordinary writs, appellate judges would continually be subject to the temptation to grant such relief merely because they are sympathetic with the purposes of the petitioners' underlying actions, or because they question the trial court's ability to direct the litigation efficiently or impartially. As with many other facets of judicial power, the continuing effectiveness of appellate court's section 1651 power depends on its reasoned and principled exercise.

Ibid. at pages 653-54.

Justice Stevens has emphasized that this Court's restraint in granting mandamus relief is tempered by the same reasons:

> "Mandamus is an 'extraordinary remed[y],' [citations omitted], precisely because of the great respect we have for our fellow jurists. . . . Respect for our fellow judges means providing them latitude in the handling of their burgeoning dockets, and in granting due deference to those whose dockets are less discretionary than ours."

In Re: Blodgett, 502 U.S. 236, 243, 112 S.Ct. 674, 678, 116 L.Ed.2d 669 (1992) (Stevens, J., concurring).

The Fifth Circuit's grant of mandamus relief without first hearing the other side could convey an impression to the bar that it may entertain *de novo* review of § 1404(a) transfer motions, as well as other pretrial motions. Postponing appellate review until after a final judgment not only avoids piecemeal litigation, but also ensures the court will have a well-developed record to show if harm truly occurred. The temptation to dispense with formalities will serve to undermine the district court's authority and engender more requests to intervene in sensitive pretrial matters without the safeguards afforded by an appeal.

II. THE FIFTH CIRCUIT'S TWO-SENTENCE ORDER FAILS TO COMPLY WITH THE HOLDING IN *WILL V. UNITED STATES*, 389 U.S. 107, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967) THAT THE COURT ISSUING A WRIT OF MANDAMUS GIVE A REASONED EXPOSITION JUSTIFYING ITS ACTIONS

The Fifth Circuit's July 12, 1995, order gives no legal or factual basis for its ruling. The order does not state what facts the District Court disregarded nor does it describe how the lower court exceeded its jurisdiction or grossly abused its discretion.

In *Will v. United States*, 389 U.S. 107, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967), the Government filed for mandamus to order the trial court vacate an order to answer a bill of particulars in a criminal case. Initially, the Seventh Circuit denied the petition; however, on rehearing, it reversed itself and issued a brief, unpublished order granting mandamus relief. *Ibid.*, 389 U.S. at 95, 88 S.Ct. at 273. After finding that the cursory record did not indicate an extraordinary case justifying relief, this Court expressed concern over the Seventh Circuit's short order. Due regard for the extraordinary nature of the mandamus remedy and the awkward position of the district court " . . . demands that a court issuing the writ give a reasoned exposition of the basis for its action." 389 U.S. at 107, 88 S.Ct. at 280. With regard to the writ's corrective or teaching functions, it observed:

> " . . . we fail to see how they can be served here without findings of fact by the issuing court and some statement of the court's legal reasoning. A mandamus from the blue without rationale is

> tantamount to an abdication of the very expository and supervisory functions of an appellate court upon which the Government rests its attempt to justify the action below."

389 U.S. at 107, 88 S.Ct. at 280. This Court vacated the mandamus order and remanded to the Seventh Circuit for further review.

The *Will* opinion instructs that an exposition of the facts and law supporting its decision goes to the core of mandamus power; it acts as a useful check on the limited remedy 28 U.S.C. § 1651 affords and as a means of accountability to this Court for how that remedy is exercised. Mandamus serves to cure clear errors only when done on a carefully articulated legal and factual basis. This compels the power of mandamus to be a restrained exercise of a rule of law rather than a newfound means of interlocutory review.

III. DISTRICT COURT DID NOT CLEARLY ABUSE ITS DISCRETION OR USURP ITS POWER BY CONCLUDING ETHICON/J&J FAILED TO CARRY THEIR BURDEN TO PROVE THE CONVENIENCE OF THE WITNESSES AND PARTIES MANDATED A TRANSFER OF VENUE

A. Standard for Mandamus Relief Militates Against Mandamus Review of Ruling About Which Venue is Most Convenient

Only exceptional circumstances amounting to judicial usurpation of power justify invoking the writ of mandamus. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1960); *Will v. U.S.*, 389 U.S. at 95, 88 S.Ct. at 273.

The writ cannot issue unless Ethicon/J&J prove (i) conduct amounting to a usurpation of judicial power or a *clear* abuse of discretion; (ii) a lack of adequate alternative means to obtain relief; and (iii) that their right to the writ is clear and indisputable. *Mallard v. U.S. District Court, S.D. of Iowa*, 490 U.S. 296, 308, 109 S.Ct. 1814, 1822, 104 L.Ed.2d 318 (1989). The writ's function is to determine the proper criteria and leave their application to the District Court. *Schlagenhauf v. Holder*, 379 U.S. 104, 112, 85 S.Ct. 234, 239, 13 L.Ed.2d 152 (1964).

Where the District Court has wide discretion, it cannot be said that any right to relief is clear and indisputable. The district court deserves substantial deference and the court of appeals cannot substitute its judgment for that of the lower court even for acknowledged errors. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. at 36, 101 S.Ct. at 191. The appellate court should not exercise discretionary functions which the rules commit to the lower court. The writ should not be used to control the lower court's discretion. *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245, 84 S.Ct. 769, 772, 11 L.Ed.2d 674 (1964).

The kind of *clear* abuse of discretion to justify mandamus is *more* stringent than the "abuse of discretion" standard in an ordinary appeal. *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 18-19, 103 S.Ct. 927, 937-38, 74 L.Ed.2d 765 (1983); *McDermott Int., Inc. Co. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1203 at n. 5 (5th Cir. 1991), *reh'g en banc denied*, 947 F.2d 1489 (5th Cir. 1991); 1 Childress & Davis, Federal Standards of Review (2d Ed.) § 4.22, pp. 4-167 (1992). After a detailed review of recent Supreme Court opinions, the Fifth Circuit itself has recognized a heightened standard:

> "When a matter is entrusted to the discretion of the district court, mandamus will not issue absent a clear abuse of discretion *amounting to a judicial usurpation of power.*"

In Re: First South Savings Assoc., 820 F.2d 700, 707 (5th Cir. 1987).

Section 1404(a) states a District Court *may* transfer a civil case for the convenience of the parties and witnesses, but does *not* say it must do so. The decision as to which venue is more convenient for the parties and witnesses is a matter committed to the district court's discretion. *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966); *In Re: McDonnell-Douglas Corp.*, 647 F.2d 515, 516 (5th Cir. 1981). The writ should not issue based on a claim that, on balance, one venue is more convenient than another. *Garner v. Wolfinbarger*, 433 F.2d 117, 120-21 (5th Cir. 1970).

Authorities express strong doubt that the "clear abuse of discretion" grounds can or should be used to overrule the district court's finding as to which venue is more convenient under § 1404(a). 16 Wright, Miller, Cooper & Gressman, Federal Practice & Procedure § 3935, pp. 252-53 (1977) ["On balance, it would be better to hold writ review available only to correct transfers in excess of power, or to direct that decision be made only on the basis of proper criteria. Even use of such writs as a long step toward interlocutory appeal, it may be better to deny all paths to interlocutory appeal, as proposed by a number of commentators and the American Law Institute"]; Tigar, Federal Appeals, (2d Ed.), § 3.07 (1993).

B. District Court Did Not Clearly Abuse Its Discretion

This case demonstrates why mandamus should not issue to supervise how a district court evaluates the convenience to the parties and witnesses for a request for a § 1404(a) transfer. The District Court remained sensitive to the charge of "forum shopping." It reviewed the correct criteria before concluding that Ethicon/J&J failed their burden of proof to show the convenience of the parties and witnesses strongly favored a transfer. Ethicon/J&J just did not carry their burden.

Section 1404(a) was not intended to limit the Plaintiffs' venue privilege. *Van Dusen v. Barrack*, 376 U.S. 612, 635, 84 S.Ct. 805, 819, 11 L.Ed.2d 945 (1964). Plaintiff's choice of forum is entitled to considerable weight, and will not to be disturbed lightly. *FDIC v. Citizen's Nat. Bank & Trust Co.*, 592 F.2d 364, 368 (7th Cir. 1978), *cert. denied*, 444 U.S. 829, 100 S.Ct. 56, 62 L.Ed.2d 37 (1979); *Shuttle v. Armco Steel Corp.*, 431 F.2d 22, 25 (2nd Cir. 1970), *cert. denied*, 401 U.S. 90, 91 S.Ct. 871, 27 L.Ed.2d 808 (1971); *Time, Inc. v. Manning*, 366 F.2d at p. 698. It is rare that the chosen venue is the most economical and desirable one for all parties; a transfer is not granted when it will only shift the inconvenience from the movant to the nonmovant. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986); *Hupp v. Siroflex of Amer., Inc.*, 848 F.Supp. 744, 749-50 (S.D.Tex. 1994).

The district court must decide convenience and fairness on an individualized, case-by-case basis. *Van Dusen*, 376 U.S. at 622, 84 S.Ct. at 812; *Stewart Organ., Inc. v. Ricoh Corp.*, 487 U.S. 22, 19, 108 S.Ct. 2239, 2244, 101 L.Ed.2d 22 (1988). Thus, § 1404(a) places a *heavy* burden on the

movant to prove why the transferee forum is clearly more convenient; unless the balance of relevant factors *strongly* favors a transfer, the choice of forum is not disturbed. *Time, Inc. v. Manning*, 366 F.2d at 698; *Heller Financial, Inc. v. Midway Powder Co., Inc.*, 882 F.2d 1286, 1293 (7th Cir. 1989); *Lykes Bros. Steamship Co. v. Sugarman*, 272 F.2d 679, 681 (2nd Cir. 1959). It is not enough that the events occurred elsewhere; section 1404(a) requires proof that the other venue is more convenient to the witnesses. *Headrick v. A.T. & S.F. Ry.*, 182 F.2d 305, 310 (10th Cir. 1950); *Lykes Bros. Steamship Co.*, 272 F.2d at 681-682; 15 Wright, Miller & Cooper, Federal Practice & Procedure § 3848, p. 385 (1986).

Ethicon/J&J had to show that key or material witnesses were inconvenienced; the focus is on quality, not mere numbers. *Continental Airlines, Inc. v. American Airlines, Inc.*, 805 F.Supp. 1392 (S.D.Tex. 1992); *Amer. Gen. Fire & Cas. v. Wal-Mart Stores, Inc.*, 791 F.Supp. 763, 768 (W.D.Ark. 1992); *Young v. Armstrong World Ind., Inc.*, 601 F.Supp. 399, 401 (N.D.Tex. 1984). The convenience of their employees receives less consideration, for they can compel their attendance. *Continental Airlines, Inc.*, 805 F.Supp. at 1397; *Hupp*, 848 F.Supp. at 749.

Mr. Stean's affidavit does not state who are the witnesses. General, vague statements of the inconvenience to unnamed witnesses wholly fails to satisfy the movant's burden under § 1404(a). *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 218 (2nd Cir. 1978), *cert. denied*, 440 U.S. 908, 99 S.Ct. 1215, 59 L.Ed.2d 455 (1979); *Texas Gulf Sulphur Co. v. Ritter*, 371 F.2d 145, 148 (10th Cir. 1967); *Hupp*, 848 F.Supp. at 749; *Modern Computer Corp. v. Ma*, 862 F.Supp. 938, 948 (S.D.N.Y. 1994); 15 Wright, Miller & Cooper, Federal

Practice & Procedure § 3851, p.425. Vague claims that unspecified documents or evidence are located in the transferee forum are equally inadequate. *State Street Capitol Corp. v. Dente*, 855 F.Supp. 192, 197 (S.D.Tex. 1994).

Therefore, the District Court did not abuse its discretion in concluding that Ethicon/J&J failed to prove the convenience of material witnesses compelled a transfer to the Northern District. It was readily apparent that decision-makers on implementing Luther's design and agreeing to pay him were in New Jersey, which makes San Angelo no more convenient than Brownsville. Ethicon/J&J proceeded on the theory that Luther's choice of venue has less weight when he does not live in the selected venue and the events did not occur there. However, this rationale is just one application of the rule that the defendant has the burden to persuade the district court that transfer should be granted. *See*, 15 Wright, Miller & Cooper, Federal Practice & Procedure, § 3848, p. 383. This argument alone does not carry their burden because § 1404(a) does not command a transfer to a venue that seems more "relevant" to the transaction. *Compare, In Re: McDonnell-Douglas Corp.*, 647 F.2d at 517; *Lykes Bros. Steamship Co. v. Sugarman*, 272 F.2d at 681-82; *Headrick v. A.T. & S.F. Ry.*, 182 F.2d at 310.

IV. IF THE RECORD INDICATED MANDAMUS RELIEF WAS WARRANTED, THE CORRECT REMEDY IS TO ORDER THAT THE DISTRICT COURT RECONSIDER ITS DECISION

Assuming arguendo the District Court erred in denying a § 1404(a) transfer, the correct remedy was to direct

it to reconsider the motion, rather than summarily order it to transfer the case. *See, Van Dusen v. Barrack*, 376 U.S. at 646, 84 S.Ct. at 824; Tigar, Federal Appeals: (2d Ed.), § 3.07, p. 160 (1993).

This is especially appropriate in light of Ethicon/J&J's tactic of withholding discovery so as to deny Luther admissible discovery answers to counter Stean's affidavit. Staying discovery pending a motion to transfer venue is not favored, because the nonmoving party often needs discovery responses to answer the motion. *See, Kron Medical Corp. v. Groth*, 119 F.R.D. 636, 638 (M.D.N.C. 1988). Ethicon/J&J's tactic was to *de facto* stay discovery, so that the Fifth Circuit would have only Mr. Stean's cursory affidavit.

If this review came after a final judgment, the Fifth Circuit would have a well-developed record to show whether, in fact, the venue was truly inconvenient. The only appropriate remedy, if mandamus was necessary, would be to order a rehearing, so that Luther can present the District Court with the evidence withheld from him before it ruled.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a Writ of Certiorari to review the Judgment of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

ROGER W. HUGHES

ADAMS & GRAHAM, L.L.P.
P. O. Drawer 1429
Harlingen, TX 78551-1429
210/428-7495; FAX: 210/428-2954

Attorneys for Petitioner,
Joe Michael Luther

APPENDIX A

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 95-40546

IN RE: ETHICON, INC. and
JOHNSON & JOHNSON,

Petitioners.

Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas

---

(Filed Jul. 12 1995)

Before JOLLY, DAVIS and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

The petition for writ of mandamus seeking an order vacating the district court's June 6, 1995 order declining to transfer this case under 28 U.S.C. § 1404(a) is GRANTED.

A writ of mandamus will issue directing the district court to transfer the case under 28 U.S.C. § 1404(a) to the Northern District of Texas, San Angelo Division.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-40546

In Re: ETHICON, INC.; In Re: JOHNSON & JOHNSON PROGRAMMING SERVICES, INC.

Petitioners

In Re: ETHICON, INC.; In Re: JOHNSON & JOHNSON PROGRAMMING SERVICES, INC.

Petitioners

Appeal from the United States District Court
for the Southern District of Texas, Brownsville

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 7/12/95 , 5 Cir., ___, ___ F.3d ___)

(Filed August 31, 1995)

Before JOLLY, DAVIS and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

JOE MICHAEL LUTHER	§	CIVIL ACTION
VS.	§	NO. B-95-042
	§	
ETHICON, INC. AND	§	(Filed
JOHNSON & JOHNSON	§	Jun. 6, 1995)

MEMORANDUM AND ORDER

Defendants, Ethicon, Inc., and Johnson & Johnson seek to have this case transferred to the San Angelo Division of the Northern District of Texas "for the convenience of the parties and witnesses, in the interest of justice . . . " 28 U.S.C. § 1404(a).

BACKGROUND

Joe Michael Luther, in his First Amended Original Complaint, alleges that he invented a machine which makes drilled hole surgical needles very efficiently. He also claims to have invented an attachment for this machine, but he does not describe the purpose of this attachment. According to Luther, the Defendants promised to pay him for the use of these inventions, but they have not done so even though Defendants are using the inventions in several of their plants in various locations. Luther prays for damages and an order forbidding Defendants from the further use of his inventions.

MOTION TO TRANSFER VENUE

In their Motion to Transfer Venue, Defendants seek transfer to the San Angelo Division of the Northern District of Texas. They claim that Luther is a resident of San Angelo, that the machines in question are used in a facility in San Angelo, that documents involved in the case are in San Angelo and witnesses are located in San Angelo.

Attached to their Motion to Transfer Venue and Supporting Brief is the affidavit of Ted Steans, Plant Manager of the Ethicon facility in San Angelo, Texas. In his affidavit, Mr. Steans states that both Defendants' headquarters are in New Jersey, that Mr. Luther has only worked in Ethicon's San Angelo Plant, that the machines and ". . . most of the documents relevant to this action are located at Ethicon's San Angelo Plant."

The Motion and affidavit do not name any witness the Defendants plan to call or outline any testimony Defendants plan to offer. *Young v. Armstrong World Industries, et al.*, 601 F.Supp. 399, 401-402 (N.D. Tex. 1984).

The defendants claim that the only connection this case has with the Brownsville Division of the Southern District of Texas is the office of Luther's lawyers.

Luther responds to the Motion to Transfer Venue by arguing that venue is proper in the Brownsville Division of the Southern District of Texas, that his choice of forum is entitled to deference, and that defendants have not shown that trial in Brownsville is any less inconvenient than trial in San Angelo.

Luther could have filed his case in the Northern District pursuant to 28 U.S.C. § 1391(a) which states in part that a diversity action may be filed in any judicial district ". . . in which a substantial part of the events or omissions giving rise to the claim occurred. . . . "

However, Luther could have filed in any judicial district in Texas, because 28 U.S. § 1391(c) states that for venue purposes a corporation is deemed to be a resident of any judicial district in which it is subject to personal jurisdiction. Luther has stated that both Defendants do business throughout Texas and that Ethicon's registered agent is in Houston, within the Southern District. In a hearing held on June 1, 1995, counsel for Defendants admitted that they were amenable to suit in any judicial district in Texas. The only venue issue before the Court is whether or not the case should be transferred under 28 U.S.C. § 1404(a), *forum non conveniens.*

The Supreme Court has stated, *Stewart Organization Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1987), "A motion to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors."

Those factors include the Plaintiff's choice of forum, convenience of the witnesses and parties, the interests of justice and the status of the court's docket. The Plaintiff has chosen this forum. The cases instruct that great weight should be given this factor in determining whether or not to grant a 1404(a) motion, *Time Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966). Even though a substantial amount of evidence, both documentary and testimony must be obtained from Defendants' employees in San Angelo, it is apparent from the representations of

counsel and Mr. Steans' affidavit that some of the documentary evidence and testimony may be located in New Jersey and Puerto Rico.

The Defendants have not shown the Court, with any specificity, that the Brownsville Division is so inconvenient as to militate in favor of a transfer to San Angelo. *Elbalah v. Republic Ins. Co.*, 879 F.Supp. 3, 4 note 1 (D. RI 1995).

The Court is of the opinion that Defendants have not carried their burden of showing that this case should be transferred.

Defendants' Motion to Transfer Venue is **DENIED**.

DONE at Brownsville, Texas, this 6th day of June, 1995.

/s/ John Wm. Black
John Wm. Black
United States
Magistrate Judge

TRUE COPY I CERTIFY
ATTEST:
MICHAEL N. MILBY, Clerk

By /s/ Paula Tamay
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

JOE MICHAEL LUTHER	§	CIVIL ACTION
VS.	§	NO. B-95-042
	§	
ETHICON, INC., and	§	(Filed
JOHNSON & JOHNSON	§	Jun. 27, 1995)

ORDER

Before the Court is Defendant Ethicon, Inc.'s, ("Ethicon") and Johnson & Johnson's ("J&J") Objection to the Magistrate Judge's Order Denying Defendants' Motion to Transfer Venue. On June 6, 1995, after a hearing on the matter, Magistrate Judge John William Black issued a Memorandum and Order denying the Defendants' Motion to Transfer Venue to the San Angelo Division of the Northern District of Texas. The Defendants' Motion to Transfer arises under 28 U.S.C. § 1404(a) which states: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district court or division where it might have been brought."

Pursuant to 28 U.S.C. § 636(b)(1)(A), this Court reviews nondispositive orders by a magistrate judge using a "clearly erroneous or contrary to law" standard. Further, and perhaps most importantly, the determination of whether to transfer venue is a decision resting within the sound discretion of the trial court. *See Jarvis Christian College v. Exxon Corp.*, 845 F.2d 523 (5th Cir. 1988). Thus, taking these two principles together, our inquiry launches

from a basis of considerable deference owed Magistrate Judge Black's judgment.

In a hearing held before Magistrate Judge Black on June 1, 1995, the Defendants admitted their amenability to suit in any judicial district of Texas. This fact is inescapable under 28 U.S.C. § 1391(c) which states that for venue purposes a corporation is deemed a resident of any judicial district wherein it is subject to personal jurisdiction. Here, both Defendants do business throughout Texas, and Ethicon's registered agent is in Houston, within the Southern District of Texas. Nevertheless, the Defendants argue that venue should rest in San Angelo due to the inconvenience of the Brownsville Division upon the parties and witnesses.

In determining whether to transfer a case, the Court should consider several factors, including: availability and convenience of witnesses and parties, location of counsel, location of books and records, cost of obtaining attendance of witnesses and other trial expenses, place of the alleged wrong, the possibility of delay and prejudice if transfer is granted, and the Plaintiff's choice of forum. *Dupre v. Spanier Marine Corp.*, 810 F.Supp. 823, 825 (S.D. Tex. 1993). In the Court's view, as long as some of these factors militate in favor of retaining venue in Brownsville, then the Court will find that Magistrate Judge Black's Order should be upheld. Notwithstanding, the Court recognizes that some factors – particularly location of books and records and place of the alleged wrong – might weigh in favor of transfer.

1. Availability and Convenience of Witnesses and Parties

While the Movants failed to identify their key witnesses and outline their purported testimony despite inquiry by Magistrate Judge Black, this Court logically may infer – due to the nature of this case – that nearly all witnesses and parties will be employees of the Defendants. This finding weighs heavily against transferring venue because the Movants can compel those witnesses and parties to attend trial. *Dupre,* 810 F.Supp. at 825. Thus, the Defendants will not suffer any undue inconvenience in securing the presence of needed witnesses and parties.

2. Possibility of Delay or Prejudice If Transfer Granted

On June 1, 1995, Magistrate Judge Black entered a Scheduling Order establishing a discovery deadline for November 17, 1995, and promptly setting the trial on the merits for March, 1996, merely nine months after the initial pretrial conference. With a date certain for trial, this Court loathes unwinding that progression and strongly desires to expedite discovery and to continue efficiently addressing its docket. Indeed, the Court recently denied the Defendants' Motion to Stay Discovery, and Plaintiffs already have made significant discovery efforts. Thus, a transfer of venue at this juncture will unduly delay and prejudice the parties' interest in a speedy trial.

3. Plaintiff's Choice of Forum

Generally, a plaintiff's choice of forum shall not be lightly disturbed unless compelling facts exist in favor of another forum. *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839 (1947). While not dispositive, this factor is entitled to great weight, though the Court must examine the Plaintiff's choice carefully, remaining vigilant against forum shopping, particularly when the Plaintiff does not live in the Southern District of Texas. *Dupre*, 810 F.Supp. at 828. However, the Court finds no nefarious motive in Plaintiff's forum choice. In fact, Mr. Luther's attorney is located within the Brownsville Division, and his selection of counsel arises not from forum shopping, but from a prior employment relationship between the attorney and his wife.

In conclusion, while a plethora of caselaw surrounding forum *non conveniens* issues provides rhetorical fodder for both sides of this issue, the Magistrate Judge properly considered the relevant factors in his decision to retain venue in the Brownsville Division. Thus, given the deference due a nondispositive order by a magistrate judge, the Court finds that Magistrate Judge Black's Order was neither clearly erroneous nor contrary to law, and the Court will leave his Order Undisturbed.

Accordingly, **IT IS ORDERED** that the Defendants' Objections to the Magistrate Judge's Order Denying Defendants' Motion to Transfer Venue are **OVERRULED** and their Motion to Set Aside that Order is **DENIED.**

Done this 27th day of June, 1995, in Brownsville, Texas.

/s/ Filemon B. Vela
FILEMON B. VELA
UNITED STATES
DISTRICT JUDGE

TRUE COPY I CERTIFY
ATTEST:
MICHAEL N. MILBY, Clerk
By /s/ Maxine Garza
Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

JOE MICHAEL LUTHER, Plaintiff,	§	CIVIL ACTION
v.	§	NO. B-95-042
ETHICON, INC.; AND JOHNSON & JOHNSON, Defendants.	§	

DECLARATION OF TED STEANS

1. My name is Ted Steans. I am over twenty-one (21) years of age. I am of sound mind and am fully able to give this declaration. Unless otherwise stated, all the facts set out in this declaration are based upon my own personal knowledge.

2. Since September 1991, I have been employed by Ethicon, Inc. ("Ethicon") as Plant Manager of its San Angelo facility. As Plant Manager, I am responsible for overseeing all operational, managerial, and personnel matters at Ethicon's San Angelo facility. I have knowledge of the machine allegedly invented by Joe Michael Luther ("Luther").

3. Ethicon's headquarters and principal place of business is in Somerville, New Jersey. The headquarters and principal place of business of Johnson & Johnson ("J&J") is in New Brunswick, New Jersey. Both Ethicon and J&J are licensed to do business in Texas.

4. Throughout his employment at Ethicon, Luther has worked only at Ethicon's San Angelo facility, which is located at 3348 Pulliam, San Angelo, Texas 76902. Neither Ethicon not J&J has an office or plant located in Cameron or Willacy County, Texas.

5. According to Ethicon's personnel records, Luther's home address is 4100 Ben Ficklin, Apartment #154, San Angelo, Texas 76901, which is located in Tom Green County, Texas. Luther has not informed Ethicon that this address is no longer correct. Luther currently is on a medical leave of absence.

6. None of the employees currently working in Ethicon's San Angelo plant or who have worked in that plant at the same time as Luther commuted from Cameron or Willacy County, Texas.

7. The "Luther machines" as well as most of the documents relevant to this action are located at Ethicon's San Angelo plant. The incidents of which Luther complains all allegedly occurred at Ethicon's San Angelo plant.

8. I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 8, 1995.

/s/ Ted Steans
Ted Steans